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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE

**Follow-up to the Green Paper on combating counterfeiting
and piracy in the single market**

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Summary

In 1998, the Commission consulted the interested parties, by means of the Green Paper on combating counterfeiting and piracy in the single market, in order to determine the economic impact of this phenomenon on the single market, to assess the effectiveness of the applicable legislation and to suggest approaches that could be explored with a view to improving the situation.

This consultation confirmed that counterfeiting and piracy were major problems in most economic and industrial sectors in the single market and that the Commission, and the European Union in general, should take steps to strengthen and improve the fight against counterfeiting and piracy in the single market at EU level.

This Communication contains an **action plan** which sets out actions that should be carried out as a matter of urgency, for which the Commission will submit proposals in the near future, medium-term actions and other initiatives.

Actions to be carried out as a matter of urgency

- (1) The Commission will submit a proposal for a Directive aimed at strengthening the means for enforcing intellectual property rights and defining a general framework for the exchange of information and administrative cooperation ;
- (2) On the basis of existing programmes, the Commission will develop training activities for officials of law enforcement authorities, including those of the applicant countries, and public information and awareness activities;
- (3) The Commission will continue to give priority to combating counterfeiting and piracy in the enlargement negotiations;
- (4) The Commission will launch a study for defining a methodology for collecting, analysing and comparing data on counterfeiting and piracy;
- (5) The Commission intends to identify a contact point at Commission level. This will provide an interface between the various departments for work on combating counterfeiting and piracy and promote transparency vis-à-vis the outside world;

Medium-term actions

- (6) The Commission will examine the appropriateness of setting up complementary administrative cooperation mechanisms for combating counterfeiting and piracy, particularly between the competent national authorities but also between these authorities and the Commission;
- (7) The Commission will examine the need to submit proposals for harmonising the minimum thresholds for criminal sanctions, extending Europol's powers to include combating counterfeiting and piracy and establishing a structure permitting access - via an Internet site, for example - to judgments by national courts;

Other initiatives

- (8) In this Communication, the Commission sets out recommendations aimed in particular at making better use of existing information systems and strengthening cooperation and exchange of information between the private sector and public authorities.

INTRODUCTION

1. Counterfeiting and piracy in the single market cause deflections of trade and market disturbances, particularly when national differences in the means of enforcing intellectual property rights are exploited, since there are still major disparities in the level of protection of intellectual property in the Member States of the European Union, particularly as regards effectively exercising these rights. The arrangements for applying provisional measures, which are used in particular for safeguarding evidence and calculating damages, or the arrangements for applying the procedures for stopping counterfeiting or piracy vary widely from one Member State to another. In some Member States, measures and procedures such as the right to information and the withdrawal of disputed goods from the market at the offender's expense do not exist. These disparities hamper the smooth-running of the single market and make it difficult to combat counterfeiting and piracy effectively. This leads to a loss of confidence in the single market on the part of economic operators and a consequent reduction in investment. Apart from the economic and social consequences, the phenomenon appears to be increasingly linked to organised crime and is developing in new ways with the Internet. Combating this phenomenon is therefore of vital importance for the European Union.
2. The purpose of this Communication is to announce, in the form of an action plan, the various measures and initiatives that the Commission intends to take in order to improve and strengthen the fight against counterfeiting and piracy in the single market. All the interested parties - above all, the holders of intellectual property rights - must be involved in the implementation of this action plan. The aim of the plan is to supplement, for the single market, existing measures for checking counterfeit and pirated goods at the external borders of the EU (Regulation No 3295/94 amended) and the initiatives on combating counterfeiting and piracy in connection with relations with non-member countries and multilateral agreements (particularly the Agreement on trade-related aspects of intellectual property rights, TRIPS, concluded under the aegis of the World Trade Organisation¹).
3. On 15 October 1998, the Commission issued a Green Paper on combating counterfeiting and piracy in the single market² in order to launch a debate with all the interested parties. The approaches suggested in the Green Paper were monitoring by the private sector, effective use of technical security and authentication devices, sanctions and other means of enforcing intellectual property rights, and administrative cooperation between the competent authorities.
4. The Commission received several responses (145) and, on 2 and 3 March 1999, it organised, together with the German Presidency of the EU Council, a hearing open to all interested parties in Munich and, on 3 November 1999, an experts' meeting with the Member States. The Economic and Social Committee issued its Opinion on the

¹ Council Decision 94/800/EC, of 22 December 1994, concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ No L 336 of 23/12/1994, p. 213.

² COM(98)569 final.

Green Paper on 24 February 1999³ and the European Parliament adopted a Resolution on 4 May 2000⁴.

RESPONSES TO THE GREEN PAPER⁵

5. The consultation process confirmed the harmful effects of counterfeiting and piracy to the smooth operation of the Internal Market. The scale on which the phenomenon takes place in the Single Market is considerable and generally increasing, even if it is difficult to quantify because of the clandestine nature of these activities. It is a major problem for all sectors of the economy since it discourages investment and innovation, causes job losses and represents a danger for consumers. The global figures from the Counterfeiting Intelligence Bureau set up by the International Chamber of Commerce⁶ according to which the trade of counterfeiting and piracy would represent from 5 to 7 % of world trade with a cost from € 200 to 300 billion a year and with global losses of 200 000 jobs a year are frequently quoted by the interested parties. They consider that European Union companies having international activities would lose between € 400 and 800 million in the Internal Market and € 2 000 million outside the Union. The share of counterfeiting and piracy, in percentage in relation to legitimate trade in the Internal Market, would be as follows according to the information provided by certain concerned sectors:

Share of counterfeiting/piracy in % of legitimate trade in the Internal Market

Sectors concerned	Counterfeiting/piracy rate
Software	39
Audio-visual	16
Textile	10 to 16
Music	10
Car spare parts	5 to 10
Sport and leisure	5 to 7

The interested parties complained about the lack of uniformity in the systems of sanctions, which had implications for trade between Member States and a direct impact on competition in the single market. The disparities meant that counterfeiting and piracy were concentrated in particular areas of the European Union because counterfeit and pirated products tended to be manufactured and sold in the countries where the repression of counterfeiting and piracy was less effective than in others. This led to deflections of trade, distortion of competition and market disturbances. For this reason, the interested parties, including the Member States, hoped that the problem would be dealt with vigorously and that ambitious initiatives would be taken at European Union level.

6. The Commission generally shares the concerns voiced by the interested parties, whose wishes also correspond to the objectives of the Commission policy aimed at facilitating the development of innovative and creative activity in Europe, particularly through systematic and effective protection of intellectual property rights in the single market.

³ OJ C 116 of 28 April 1999, p. 35.

⁴ Not yet published.

⁵ The report on the responses to the European Commission Green Paper on Counterfeiting and Piracy can be consulted at: http://europa.eu.int/comm/internal_market/fr/intprop/indprop.

⁶ *Counterfeiting and Piracy. A guide to protecting & enforcing intellectual property rights*, Counterfeiting Intelligence Bureau, International Chamber of Commerce, 1997.

7. According to the responses to the Green Paper, monitoring by the private sector could be stepped up, particularly in terms of cooperation with public authorities. Most of the responses stressed the need for better coordination between databases and increased cross-border information flows, involving national authorities and professional bodies. The responses were generally in favour of public information and awareness campaigns on the negative implications and dangers of counterfeiting and piracy. The right of professional bodies to take legal action was generally accepted. As for the use of technical security and authentication devices, the interested parties called for legislation prohibiting the manufacture and distribution of illegal technical devices, and providing channels for recourse against tampering with legitimate devices. In the case of multimedia products (CD, CD-ROM, DVD), rightholders hoped that the use of identification codes would be made obligatory.
8. Sanctions and other ways of enforcing intellectual property rights should, according to the interested parties, be equally effective in all the Member States. Some parties advocated the harmonisation of sanctions and criminal proceedings. The majority of responses called for harmonised rules on the closure of establishments and shops and the confiscation of equipment used for illicit purposes. The interested parties also complained about the diversity and inadequacy of the national measures for collecting evidence and taking action. They called for uniform search and seizure procedures and more effective cross-border injunctions. They also hoped that flat-rate or punitive damages would be provided for in all the Member States. Most of the comments were in favour of introducing the right to information⁷ and the publication of judgments in all Member States. The responses to the Green Paper revealed a broad consensus on the need for improvements in administrative cooperation between the competent national authorities in the fight against counterfeiting and piracy in the single market, including training aspects and the exchange of officials. The responses stressed that the Commission should play a major role.

ACTIVITIES ENVISAGED BY THE COMMISSION

9. The Commission stresses that, while the public authorities certainly have an important part to play in combating counterfeiting and piracy, responsibility lies primarily with the holders of intellectual property rights, who must be on their guard - especially in the policy they adopt on granting licences and monitoring the quality of products and services.
10. The Commission proposes to follow up the Green Paper with this action plan, which sets out activities that should be carried out as a matter of urgency and for which the Commission will submit proposals in the near future, medium-term activities, and recommendations for the private sector and the public authorities that have been incorporated into the action plan itself.
11. Given that counterfeiting and piracy on the Internet are a growing cause for concern, the Commission intends to keep a close eye on developments and will, if necessary, take appropriate initiatives as part of the implementation of this action plan.

⁷ Obligation for the counterfeiter or the pirate to provide information on the origin of suspected goods, the channels of distribution and the identity of third persons involved in the production and distribution of goods.

12. The activities provided for in this action plan will obviously have to be integrated with the horizontal initiatives in the field of justice and internal affairs - particularly the European Union's strategy on the prevention and control of organised crime, in accordance with the provisions of the Amsterdam Treaty, the conclusions of the Tampere European Council of 15 and 16 October 1999⁸ and the guidelines proposed by the Commission in its Communication on the prevention of organised crime and the work of the European Forum for the prevention of organised and economic crime⁹.

ACTIVITIES TO BE CARRIED OUT AS A MATTER OF URGENCY

Directive on means of enforcing intellectual property rights

13. The Commission will submit a proposal for a Directive aimed at guaranteeing the smooth-running of the single market in this respect. However, given that the TRIPS Agreement provides for a minimalist approach to the means of enforcing intellectual property rights that are applied in all the Member States, the activities envisaged by the Commission in this field will only concern complementary improvements to this Agreement.
14. The aim of this Directive will be to harmonise the legislative, regulatory and administrative provisions of the Member States on means of enforcing intellectual property rights and ensuring that the available intellectual property rights enjoy an equivalent level of protection in the single market. It is understood that the implementation of such means remains subject to the competition rules of the treaty. It will particularly provide for:
- the right of professional bodies to take legal action to defend the collective interests for which they are responsible¹⁰;
 - the legal protection of technical devices in the field of industrial property¹¹; the legislation envisaged should prohibit the manufacture and distribution of non legitimate technical devices and provide channels for recourse against tampering with legitimate devices;
 - in appropriate cases, and without prejudice to the criminal sanctions referred to in Section 21, the possibility of closing down establishments and shops in which acts of counterfeiting or piracy have been committed, and confiscating equipment used for illicit purposes and the assets and profits of counterfeiters and pirates;

⁸ OJ C 124 of 3 May 2000, p. 1.

⁹ The European Forum for the prevention of organised and economic crime is a Commission initiative aimed at structuring work on crime prevention at European level. It is a framework for networking experts and launching initiatives.

¹⁰ Provisions of this type which create this specific right already exist in the legislation of several Member States.

¹¹ On the question of copyright and related rights, the Council's common position on the Directive on the harmonisation of certain aspects of copyright and related rights in the information society contains detailed provisions on the legal protection of technological measures. See also Article 7(1)(c) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

- civil measures and procedures, particularly as regards searching, seizure and proof, enabling holders to ensure that their intellectual property rights are respected in the single market;
- a procedure for withdrawing disputed goods from the market at the offender's expense; harmonised criteria for calculating damages; establishing a right to information and the possibility of publishing judgments on counterfeiting and piracy in the Member States, while respecting the data protection rules and especially personal data¹²;
- the designation of one or more administrative correspondents in each of the Member States responsible for dealing with operators and supervisory authorities on questions of combating counterfeiting and piracy in the single market, as already exist for matters concerning checks at the external border of the EU, and the establishment of an EU-level contact committee, made up of the national correspondents and chaired by the Commission, with the task of developing cooperation, promoting the exchange of information and examining all the various aspects of combating counterfeiting and piracy in the single market, except for penal matters¹³;
- drawing up a periodic evaluation report on the operation of the Directive, including the effectiveness of the measures taken by the various competent bodies

Moreover, the Commission will examine the opportunity of introducing an obligation to use identification codes on optical discs, as well as measures for the control of plants and manufacture.

Training and exchange of officials

15. The Commission will ensure that optimum use is made of existing and future training programmes in the training of the agents of law enforcement authorities, including the exchange of officials, so that better account is taken of the aspects relating to the fight against counterfeiting and piracy. Experience acquired by the customs administrations through Community programmes such as "Customs 2002" will also be taken into account.

Stepping up training and technical assistance for the applicant countries

16. As regards the applicant countries, the Commission will continue to give priority to combating counterfeiting and piracy in the enlargement negotiations and will see to it that training and technical assistance in this field are stepped up under the existing programmes. It will urge these countries to introduce the instruments and infrastructures needed for enforcing intellectual property rights without delay.

¹² The establishment of a register of judgments is currently being examined in connection with the implementation of the principle of Mutual recognition of Final Decisions in criminal matters, as provided for in the conclusions of the European Council of Tampere.

¹³ The administrative correspondents and the contact committee would take account of the work of the European Forum for the prevention of organised and economic crime.

Public awareness and information

17. The Commission organised, in collaboration with the French Presidency of the European Union, and in particular with the active support of the French customs authorities, a European Forum on combating counterfeiting, in Paris on 20 and 21 November 2000. It will also, as far as available resources permit, support national initiatives, in cooperation with the private sector, on public awareness of and information on the negative consequences of counterfeiting and piracy, particularly as regards the protection of consumers and public health and safety. The Commission's information programmes will be used for this purpose.

Defining a methodology for collecting, analysing and comparing data

18. The Commission intends to have a study carried out for the purpose of defining a methodology for collecting, analysing and comparing data in the single market. The methodology will particularly take account of the approach to collecting customs statistical data developed under Regulations Nos 3295/94 and 1367/95. It should be a simple, reliable and efficient evaluation tool that is easy to use and that will enable the interested parties, the Member States and the Commission to define and apply the appropriate measures for combating counterfeiting and piracy. The data collected using this methodology could be used when drawing up the evaluation report provided for by the Directive.

Commission-level contact point

19. At the level of the Commission itself, a contact point could be identified to permit greater transparency vis-à-vis businesses and the Member States on all questions relating to counterfeiting and piracy in the single market, and particularly those deriving from the implementation of the Directive referred to in Section 14. This Commission-level contact point would not have any specific competency as such but would provide the appropriate interface between the different Commission departments. Its role would be complementary to both that of the administrative correspondents and the contact committee referred to in the fifth indent of Section 14 and that of the contact point for the implementation of Regulation No 3295/94, as amended.

MEDIUM-TERM ACTIVITIES

Administrative cooperation

20. The Commission will examine the appropriateness of setting up, possibly in the form of a Regulation, specific mechanisms, complementary to those referred to in the fifth indent of Section 14, for administrative cooperation between the competent national authorities and with the Commission in the fight against counterfeiting and piracy in the single market. The proposals envisaged could be based on the existing mechanisms for administrative cooperation in other fields - particularly customs and agriculture, as well as Community own resources. This could involve establishing mutual assistance between the competent national authorities for exchanging information on matters including specific cases of counterfeiting and piracy, while respecting the rules of confidentiality and data protection, and possibly carrying out joint surveys and checks and, if the interests of the Community were at stake, establishing Community-level cooperation between these national authorities and Commission.

Harmonisation of minimum thresholds for criminal sanctions

21. The Commission will examine the need to submit proposals for measures to establish minimum rules on the elements constituting criminal infringements and the applicable sanctions (on the basis of Article 34 of Title VI of the Treaty establishing the European Union). It will also examine the possibilities for developing customs legislation in this field. The initiative could involve the approximation of the minimum threshold for national criminal sanctions applicable to offences against a given intellectual property right and the convergence of the level of sanctions applicable to the different intellectual property rights.

Extension of the powers of Europol

22. For aspects of counterfeiting and piracy going beyond First Pillar matters, Europol's powers should be extended to combating counterfeiting and piracy, in accordance with the provisions of the Europol Convention¹⁴

Improving access to information

23. In order to improve access to information for businesses and associations, the Commission intends to set up a structure, such as a website, through which legal decisions published in the Member States would be accessible, in accordance with personal data protection, to operators and the law-enforcement authorities. This website could be based in particular on the information component in the European Judicial Network in civil and commercial matters. Via hyperlinks, it would provide access to national sites dealing with these matters.

OTHER INITIATIVES

Improving cooperation between the private sector and public authorities

24. The Commission recommends that public authorities and the private sector make better use of the databases and public and private information systems for combating counterfeiting and piracy, while respecting the rules of confidentiality and data protection. The compatibility between existing systems and any gateways that would need to be created between them should be investigated. The Commission encourages national and private initiatives aimed at concluding protocols of agreement for cooperation and exchange of information.

European judicial cooperation

25. The Commission will take account of any needs in connection with the existing instruments or work in progress on civil and criminal judicial cooperation, such as the work of the implementation of the European Judicial Network in civil and commercial matters, for the coordination of legal proceedings through EUROJUST, the mutual recognition of final decisions in criminal matters¹⁵ or the mutual recognition of judgments on civil and commercial matters. On 1 March 2000, the Commission submitted an additional contribution to the IGC on the reform of the

¹⁴ Cf. Art. 2(2), indent 3, of the Europol Convention, OJ C 316 of 27/11/1995, p. 1.

¹⁵ Cf. Commission communication of 26 July 2000 (COM(2000)495).

Community courts¹⁶, in which it expressed the view that regarding intellectual property rights under Community law, particularly with the prospect of the Community patent, consideration should be given to establishing a specialised tribunal with jurisdiction particularly in cases concerning the validity and counterfeiting of such rights.

Possibilities afforded by the specific programmes under the fifth R&D Framework Programme

26. The Commission encourages interested parties to make use of the possibilities afforded by the specific programmes under the fifth R&D Framework Programme for developing new technologies and new technical devices - particularly the specific programmes of research, technological development and demonstration in the fields of "Competitive and Sustainable Growth"¹⁷ and "Information Society Technologies". It also encourages the interested parties to contribute to the preparation of the sixth Framework Programme by giving information about R&D objectives likely to be supported in the future.

¹⁶ COM(2000)109 final.

¹⁷ For example, in October 1999, the Commission launched a call for proposals covering, *inter alia*, reference databases and, in particular, a global information system for the fight against counterfeiting (OJ C 295 15 October 1999, p. 8).